No. 9020

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

L. J. KELLY, F. H. DOLAN BEN BAXTER, S. JAMES TUFFREE, ED. KELLY, F. A. YUNGBLUTH, MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER and M. E. DAY,

Appellants,

vs.

ANAHEIM FIRST NATIONAL BANK, a national banking association and J. V. HOGAN, Receiver, Intervener,

Appellees.

Petition for Rehearing and Application for Stay of Issuance of Mandate If Petition for Rehearing Denied.

EDW. C. PURPUS,

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Parker & Baird Company, Law Printers, Los Angeles.

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TABLE OF AUTHORITIES CITED.

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PETITION FOR REHEARING.

To the Honorable Circuit Court of Appeals of the United States in and for the Ninth Circuit:

Your petitioners respectfully petition for a rehearing of their appeal and a reversal of the decree of the District Court in the above entitled matter upon the following grounds:

1. In the opinion of petitioners certain of their authorities have been overlooked.

The cases of *Yazoo State Bank v. Kimbrough,* 127 So. 149, and *In re Hulitt,* 96 Fed. 785, are directly in point. We quote pertinent parts thereof as follows:

Yazoo State Bank v. Kimbrough, supra:

"Cashiers and directors putting up cash in place of notes, examiner rejected, *held entitled to proceeds of notes when collected.*" (Italics ours.)

In re Hulitt, supra:

"Where a number of shareholders of a national bank in good faith paid an assessment made to comply with the requirements of the Comptroller to make good an impairment of the bank's capital, although such an assessment was invalid, because made by the directors instead of by the stockholders, on the insolvency of the bank, and after the winding up of its affairs by a receiver, after outside creditors are paid, such paying shareholders are entitled to be treated as creditors as against the non-paying shareholders, and repaid the amount so paid, before general distribution of remaining assets among all the shareholders."

2. We find no place in the opinion where this Honorable Court has commented upon, or decided, the following:

"The respective claims of the appellants presented to the receiver were valid and subsisting claims against the bank. The agreement entered into between the bank and the appellants in compliance with the meeting of June 18, 1931, was recognized as a valid agreement from that time until the receiver was appointed,

three years later. There is no contention but that the respective claims of the appellants herein were duly presented to the receiver in the manner and form as required by the Comptroller of the Currency on or about August 23, 1934 [R. 18, 19, 20, 21, 24]. That there can be such a valid and subsisting claim as the one in this point need scarcely be argued, but we do quote the following case on this point:

Eisele v. First National Bank, 137 Atl. 827, 101 N. J. Equity 61, affirmed (Err. & App., 1928) 142 Atl. 29, 102 N. J. Equity 598."

3. There has been no decision rendered on the point that:

"If the agreement entered into between the appellants and the bank in compliance with the meeting of June 18, 1931, was in fact unlawful, then it was void in its inception and the subscribing stockholders have the right under the law to a refund of the respective amounts, paid by them under that contract."

4. The opinion does not find upon the question:

"Findings of fact which are contradictory and in the nature of negative pregnants in form as to ultimate facts material to the cause of action imply the truth of the allegation, and since one part of the contradictory findings would support the judgment and another part would upset it, then the judgment cannot stand."

And in this connection, we cite the following:

"Findings of fact V and X are contradictory and are in form in the nature of negative pregnants as to ultimate facts material to the cause of action. A finding in the form of a negative pregnant attempting to negative an affirmative allegation implies the truth of the allegation."

Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal. App. 559, 200 Pac. 814;

Wiles v. Hammer, 66 Cal. App. 538, at p. 540;

Auerbach v. Healy, 174 Cal. 60, 65, 161 Pac. 1157;

Southern Pac. R. R. v. Dufour, 95 Cal. 615, 619, 19 L. R. A. 92, 30 Pac. 783.

"Since one part of the contradictory findings would support the judgment and another part would necessarily upset it, then the judgment cannot stand."

Learned v. Castle, 78 Cal. 450, 460, 21 Pac. 11, 13.

5. The Court, in its opinion, states as follows:

"It was not shown that the bonds, as a whole appreciated in value. On the contrary, the bond account appears to have been in a worse condition when the receiver took over, and when he later disposed of the assets, than it had been when the agreement was made. Thus, even if this were an action for an accounting, which it is not, there was no basis in the proof for any recovery."

In this connection, we cite the Supplemental Transcript of the Record, pages 188, 189 and 190 thereof, showing that there was an appreciation, however small, of $655.62, in the appreciation of the bonds of the American Beet Sugar and Associated Tel. and Tel.

We, therefore, request this Court to consider this Petition for Rehearing as a simple plea to repair an irreparable loss which will actually occur if the case is not reversed.

Respectfully submitted,

EDW. C. PURPUS,
Attorney for Petitioners.

Certificate of Counsel.

Edward C. Purpus, attorney above, filing this petition, hereby certifies that in his judgment the Petition for Rehearing is in all respects well founded, and that it is not interposed for delay.

EDW. C. PURPUS,

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May It Please Your Honors:

In the event of denial of the petition for rehearing, petitioners desire to apply to the Supreme Court of the United States for the issuance of a Writ of Certiorari, and therefore pray for a stay of the issuance of the Mandate herein for such purpose.

EDW. C. PURPUS,
Attorney for Petitioners.